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No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND R. GALLAGHER,
Petitioner,
v
CHRYSLER CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Raymond R. Gallagher prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 22, 1980.

QUESTIONS PRESENTED

I.

WHERE AN EMPLOYEE FILES SUIT, PURSUANT TO §301, 29 U.S.C. §185, AGAINST HIS EMPLOYER FOR BREACH OF CONTRACT AND JOINS IN THAT SUIT A CLAIM AGAINST HIS UNION FOR VIOLATION OF ITS DUTY OF FAIR REPRESENTATION, IS IT CONSISTENT WITH FEDERAL LABOR POLICY AND THIS COURT'S OPINION IN *UAW* v *HOOSIER* FOR THE COURT BELOW TO ADOPT A UNIFORM STATUTE OF LIMITATIONS AND APPLY THE SAME STATUTE OF LIMITATIONS TO BOTH THE CLAIM OF BREACH OF CONTRACT AND THE CLAIM OF VIOLATION OF THE DUTY OF FAIR REPRESENTATION.

II.

WHERE AN EMPLOYEE FILES SUIT, PURSUANT TO §301, 29 U.S.C. §185, AGAINST HIS EMPLOYER, CLAIMING BREACH OF CONTRACT FOR WRONGFUL DISCHARGE AND DEMANDING BACK PAY AND REINSTATEMENT, IS SUCH A CLAIM, AS THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT RULED, SUBJECT TO A STATE TORT STATUTE OF LIMITATIONS.

III.

WHETHER THIS COURT SHOULD ADOPT A UNIFORM FEDERAL STATUTE OF LIMITATIONS FOR A SUIT BY AN EMPLOYEE UNDER §301, 29 U.S.C. §185, AGAINST HIS EMPLOYER FOR BREACH OF CONTRACT WHEN THE SUIT IS ACCOMPANIED BY A CLAIM THAT THE EMPLOYEE'S UNION VIOLATED ITS DUTY OF FAIR REPRESENTATION.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in the attached Appendix (p. 20). The Opinion of the District Court for the Eastern District of Michigan is unreported and is printed in the Appendix (p. 27). The subsequent Opinion and Order of the District Court denying Petitioner's Motion for Rehearing is unreported and is printed in the Appendix. (p. 24).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 22, 1980. On April 21, 1980, Mr. Justice Stewart signed an Order extending the time for filing this Petition for Certiorari to and including June 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the Courts of the United States. Any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the District Courts of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any Court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Michigan Compiled Laws Annotated, § 600.5805(7):

> "No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.***
>
> (7) The period of limitations is three years for all other actions to recover damages for injuries to persons and property."

Michigan Compiled Laws Annotated, § 600.5807(8):

> "No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.***
>
> (8) The period of limitations is six years for all other actions to recover damages or sums due for breach of contract."

STATEMENT OF THE CASE

Petitioner (hereinafter plaintiff), a former employee of respondent (hereinafter defendant), was discharged from his employment as a result of an altercation with a fellow employee on December 6, 1971.

A grievance was filed protesting plaintiff's discharge by the duly authorized bargaining representative, Local Union 372, United Automobile Aerospace and

Agricultural Implement Workers of America (UAW). The grievance was denied by defendant and then appealed by the union to the Appeal Board step or third step of the grievance procedure. On June 28, 1972, the union withdrew the grievance without prejudice.

On February 13, 1976, plaintiff commenced this action seeking loss of wages and reinstatement in the United States District Court for the Eastern District of Michigan. The jurisdiction of the District Court was invoked under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (hereinafter § 301). In his Complaint, plaintiff alleged that defendant had breached the collective bargaining agreement between defendant and the union by discharging plaintiff without just cause. Plaintiff also joined in the suit the Local Union and the International Union alleging the union breached its duty of fair representation when it withdrew its grievance from arbitration.

On January 25, 1977, Disrict Judge Philip Pratt, in a written Opinion (p. 27) dismissed the union holding, in part, that the claim was barred by a state three-year statute of limitations for personal injury actions. He dismissed plaintiff's claim against defendant holding that the § 301 action against his employer was subject to the same three-year statute of limitations for personal injury actions.

Plaintiff filed a Motion for Rehearing. On April 1, 1977, District Judge Pratt, in a written Opinion (p. 24) denied the Motion and affirmed his prior decision.

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit from the Order of Dismissal of defendant and the denial of plaintiff's

Motion for Rehearing.[1] On January 22, 1980, the Court of Appeals affirmed the judgment of the District Court (p. 20). The Court held that the same statute of limitations applied to both plaintiff's claim against defendant and against the union and that the applicable state statute of limitations was the Michigan three year statute of limitations for personal injury actions.

REASONS FOR GRANTING THE WRIT

In a suit by an employer under § 301, whether the claim of breach of contract and the claim of violation of the duty of fair representation are subject to the same statute of limitations and whether a uniform statute of limitations for both claims may be judicially created and whether a breach of contract claim for wrongful discharge may, under any circumstances, be subject to a state tort statute of limitations are important and recurrent federal statutory questions, and separation of powers questions, which have provoked a diversity of judicial opinion and should be determined by this Court.

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[1] Petitioner did not appeal to the Sixth Circuit the dismissal of his action against the union. He does not contend that the characterization of a claim for breach of the duty of fair representation as tortious, and therefore subject to the state statute of limitations for personal injury actions, is contrary to federal labor policy, or otherwise in error. *But see, Gray* v. *Asbestos Workers, Local 51*, 416 F.2d 313 (CA 6, 1974). What he did appeal below, and what is the subject of this Petition is the dismissal of his § 301 action against his employer for breach of the collective bargaining agreement. Petitioner asserts that the application of the state tort statute of limitations to the breach of contract claim by an employee against his employer is contrary to federal labor policy and to prior decisions of this Court, *infra*. It is also in conflict with previous decisions of the 6th Circuit and of the Michigan Courts. *Reliford* v. *Eastern Coal Corp.*, 260 F.2d 447 (CA 6, 1958), *cert. denied*, 359 U.S. 958; *Barry* v. *Detroit Terminal Railroad Co.*, 307 Mich. 226 (1943).

A.

THE CHARACTERIZATION BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT OF PLAINTIFF'S CLAIM AGAINST HIS EMPLOYER FOR BREACH OF CONTRACT AS AN ACTION FOR PERSONAL INJURIES, AND THUS SUBJECT TO A STATE TORT STATUTE OF LIMITATIONS, IS ILLOGICAL, IRRATIONAL AND CONTRARY TO THE FEDERAL LABOR POLICY.

This is a suit by an employee, who is covered by a collective bargaining agreement, against his employer for breach of that agreement. In his complaint, plaintiff asserts that defendant breached the collective bargaining agreement and, in particular, violated the "just cause" provision of that agreement, by discharging him without just and sufficient cause.

This type of action has its genesis in *Smith* v. *Evening News Association*, 371 U.S. 195 (1962). In *Smith* this Court settled the question affirmatively whether or not individual employees have a right under § 301 to sue their employers for breach of the collective bargaining agreement.

As a matter of federal labor law, there are, of course, certain procedural obstacles facing an employee who attempts to sue his employer for breach of contract. Thus, an employee must first attempt to resort to the contractual grievance procedure before suit. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). When the employee resorts to the grievance procedure and places the dispute with the employer in the hands of the union, he is bound by the result reached by the union and the employer so long as his union has not violated

the duty of fair representation. In the event the union has violated its duty of fair representation, an employee may nevertheless sue his employer for breach of contract even though he has not exhausted all of his contractual remedies. *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

This, then, is the basic federal labor law. It fully establishes the right of individual employees to sue their employers for breach of contract and, at the same time, promotes peaceful settlement of differences by requiring adherence to the contract grievance procedures.

An employee suit against his employer for breach of contract should not be confused with a suit by a union member against his union for violation of the duty of fair representation. The doctrine of fair representation has a different genesis. It derives from the exclusive bargaining representative provision of § 9(a) of the National Labor Relations Act. *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944). In the context of an employee suit under § 301 against his employer, this Court held in *Vaca* that there was Federal Court jurisdiction under § 301 to join a claim against the union for violation of its duty of fair representation. Joining the union in the § 301 action against his employer does not, however, change the character of the suit from one based upon breach of the collective bargaining agreement.

> "[I]f, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a § 301 suit . . ." *Vaca*, 386 U.S. at 187

The above abbreviated history of the development of the federal labor law with respect to an employee suit

against his employer for breach of contract and with respect to a claim of violation of the duty of fair representation and with respect to the joinder of the claims in one suit has somehow led the Court below to turn the employee suit against his employer under § 301 into a fair representation suit. Thus, the Court below characterized or adopted a State Court characterization of plaintiff's claim against his employer as being grounded in tort and therefore applied the State three year tort statute of limitations and barred this suit.

The Court below adopted the District Court's characterization of plaintiff's claim against his employer as one based on a breach of the union's duty of fair representation. The District Court provided the following reasoning for its characterization:

> "While plaintiff characterizes his action as one for breach of contract, it is clear that by the very contract which he invokes, he has agreed that the union be the exclusive 'arbiter' of any contractual grievance he has with the company. The law is equally clear that plaintiff's recourse to individual action against the company is conditioned on founded assertions that the union has breached its duty of fair representation and then only if the union's conduct toward the employee is determined to be 'arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, 386 US 517 (1967). Therefore, plaintiff's action can only be characterized as one based on a breach of the union's duty of fair representation. The Michigan Courts have decided that such an action is subject to the State three year statute of limitations for personal

> injury actions. *Glowacki* v. *Motor Wheel Corp.*, 67 Mich. App. 448; 241 N.W.2d 240 (1946)." (p. 28)

The Court below, by adopting this characterization, has stuck itself out on a limb. It is the only US Circuit Court of Appeals which has ever characterized an employee suit against his employer under § 301 as one based on the breach of the union's duty of fair representation.

Aside from the fact that the reasoning and the result reached are illogical and irrational, the Court below has made an apple out of an orange, the decision is absolutely contrary to federal labor policy. This is true for many reasons.

First, in *UAW* v. *Hoosier Cardinal Corp*, 383 U.S. 696 (1966) this Court characterized a suit brought on behalf of individual employees for violation of vacation rights under a collective bargaining agreement as one based on written contract or oral contract. The characterization given by this Court in *Hoosier* to a § 301 suit has obviously not been followed by the Court below. And, the characterization of the § 301 suit should not and can not be any different simply because plaintiff originally joined the union in this suit.

Second, if plaintiff's claim against his employer is not based on contract, as the Court below held, it logically follows that there is no Federal Court jurisdiction under § 301. The language of § 301 unmistakably gives Federal Courts jurisdiction only over "suits for violation of contracts between an employer and a labor organization. . ." Courts confronted with the issue whether § 301 authorizes jurisdiction in the Federal Courts over suits based wholly on violation of the duty of fair representation have uniformly held that it does

not. *Nedd* v. *United Mine Workers*, 400 F.2d 103 (CA 3, 1968); *Gonzales* v. *Longshoremen ILA, Local 1581*, 498 F.2d 330 (CA 5, 1974), *cert. denied*, 419 U.S. 1070 (1974); *Akerman* v. *Automobile Workers*, 82 LRRM 2541 (D.C. Ohio, 1973).

Third, if plaintiff's claim against his employer for breach of contract is based on a tortious wrong, as the Court below held, it logically follows that an employee may now recover damages for personal injuries against his employer in a § 301 suit. Although the Court below may not have intended this result, it is certain as a result of the decision below that such claims will now be made against employers at the District Court level.

Fourth, the characterization of plaintiff's claim against his employer by the District Court, and as adopted by the Court below, is inherently contradictory. The District Court suggested that plaintiff's claim against his employer was based on the duty of fair representation because he "*agreed* that the union be the exclusive 'arbiter' of any contractual grievances he has with the company." (p. 28) Even if this reasoning sheds some light on the characterization of plaintiff's claim against his employer, it is nevertheless true that plaintiff's *agreement* is based on the approval and/or ratification of a *contract*.

We respectfully submit that the Sixth Circuit has overstepped the boundaries of the developing federal labor law by its gross mischaracterization of plaintiff's claim against his employer. But, aside from the fact that plaintiff has received a terrible injustice and has been denied his day in Court, this decision will have a terribly pernicious affect on federal labor policy. This distortion, as we have mentioned, will only lead to further distortions. This Court has historically acted in

this area at least, in part, in order to quickly correct a gross distortion of the federal labor policy, e.g., *Foust* v. *IBEW*, — U.S. —, 99 S.Ct. 2121, (1979). For that reason alone, this Court should grant this Petition.

B.

THE SIXTH CIRCUIT COURT OF APPEALS HAS ADOPTED A RULE THAT THE SAME STATUTE OF LIMITATIONS WILL ORDINARILY APPLY TO BOTH THE CLAIM OF BREACH OF CONTRACT AND THE CLAIM OF UNFAIR REPRESENTATION AND THUS THE SIXTH CIRCUIT HAS ADOPTED A UNIFORM STATUTE OF LIMITATIONS UNDER § 301 IN VIOLATION OF THIS COURT'S HOLDING IN UAW v. HOOSIER.

In *Hoosier*, this Court was asked to adopt a uniform statute of limitations for § 301 suits. The Court rejected this request and held that this was a matter best left to Congress.

This Court stated:

> "The need for uniformity, then, is greatest when its absence would threaten the smooth functioning of these consensual processes that federal labor law is chiefly designed to promote — the formation of the collective bargaining agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for

> § 301 suits may well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us," *Hoosier*, 383 U.S. at 702-703.

This Court in *Hoosier* therefore directed the Federal Courts to apply in § 301 suits the most applicable State statute of limitations. In the case at bar there is no State statute of limitations with respect to an action by an employee against his employer for breach of contract which is joined by a claim against a union for violation of its duty of fair representation.

However, the Sixth Circuit Court of Appeals has invented one. The Court below held that the same statute of limitations applies to both claims.

We respectfully submit that this type of judicial legislation has been specifically rejected by this Court in *Hoosier*. In addition, this type of judicial legislation by the Court below is inherently unfair and discriminatory towards employees in a § 301 suit. Further, this type of judicial legislation is totally unwarranted and will create a host of problems for Federal Courts.

It cannot be seriously argued that the Court below has not engaged in judicial legislation. In Michigan there is a tort statute of limitations, MCLA 600.5805(7), and a contract statute of limitations, MCLA 600.5807(8). However, there is no statute of limitations in Michigan with respect to a suit in which a claim for breach of contract is joined with a tort claim.

The unfairness and discrimination towards individual employees who bring § 301 suits is apparent. For example, let us assume that in *Hoosier* the individual employees, instead of the union, brought suit against the employer. Let us further assume that the individual employees joined a claim of unfair representation against the union for its failure to protect their individual rights contained in the contract. By virtue of the joinder of the claim against the union, the substantive rights of the employees under the contract have not been changed or altered one bit. Why then should a different statute of limitations be applied to this suit?

Further, let us assume that the plaintiff in the case at bar had not joined the union in his § 301 suit. This would not have affected plaintiff's right to bring a § 301 suit, nor affected or changed his substantive rights under the contract. Plaintiff would be entitled to a trial on the merits of his breach of contract claim. *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 310 (CA 6, 1975), *reh. denied*, 528 F.2d 912 (1975).

In the example mentioned above, would a different statute of limitations apply? Or, in that instance, would the Court below have nevertheless applied the tort statute of limitations simply because plaintiff would still have to prove unfair representation even if the union was not joined in the suit? We submit the result in either event is unsound and irrational. A statute of limitations for a claim clearly should not be determined by a fortuitous event, such as the presence or absence of another party. Likewise, it is totally irrational to apply a statute of limitations on the basis of the statute of limitations that applies to a claim against a person who is not a party to the lawsuit.

The First Circuit Court of Appeals in *DeArroyo* v. *Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (CA 1, 1970), *cert. denied*, 400 U.S. 877 (1970), refused to apply a uniform statute of limitations for both claims in an employee § 301 suit. The Court in *DeArroyo* stated:

> "While we are satisfied that the proper legal analysis of the union's and employer's duties in cases such as this requires the imposition of different statutes of limitations, we are equally convinced that Congress would be well advised to enact a federal statute of limitations to deal with both kinds of claims asserted here." 425 F.2d at 287.

We respectfully submit that the reasoning by the First Circuit in *DeArroyo* is entirely consistent with this Court's reasoning in *Hoosier*. The Court below specifically rejected the First Circuit's analysis in *DeArroyo*. (p. 23) Thus, the decision of the Court below is in direct contradiction to this Court's decision in *Hoosier*.

C.

THERE IS TREMENDOUS DIVERSITY OF OPINION BY THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE AND THEREFORE THIS COURT SHOULD ISSUE A DEFINITIVE OPINION TO THE FEDERAL COURTS.

The underpinning of the opinion by the Sixth Circuit Court of Appeals in the case at bar is that the two claims, breach of contract and violation of the duty of fair representation, are so inextricably related and interconnected that the same statute of limitations

should apply to both claims. As mentioned *supra*, the Sixth Circuit stands alone in its application of a tort statute of limitations to the claim of breach of contract.

Other Circuit Courts of Appeals have used similar reasoning, but come to an opposite result. The Second Circuit in *Abrams* v. *Carrier Corp*, 434 F.2d 1234, 1252; (CA 2, 1971) *cert. denied*, 401 U.S. 1009 (1971) applied the contract statute of limitations to both the claim of breach of contract and the claim of violation of the duty of fair representation because of "their interrelated nature."

The Fourth Circuit in *Kennedy* v. *Wheeling-Pittsburgh Steel Corp.*, 81 LRRM 2349 (CA 4, 1977) applied the contract statute of limitations to the employee claim of breach of contract against his employer.

The Fifth Circuit in *Sanderson* v. *Ford Motor Co.*, 483 F.2d 102 (CA 5, 1973) applied a different statute of limitations to the claim against the employer and the claim against the union. Thus, the Fifth Circuit in *Sanderson* follows the First Circuit in *DeArroyo*.

The Eighth Circuit in *Butler* v. *International Brotherhood of Teamsters, Local 823*, 514 F.2d 442, (CA 8, 1975) *cert. denied*, 423 U.S. 924 (1975) adopted the contract statute of limitations for both claims. Thus, the Eighth Circuit relies upon the same reasoning and analysis as the Court below, but with a different result. The Court in *Butler*, noting the conflict in the Circuits, specifically rejected the result attained by the First Circuit in *DeArroyo* and adopted the result of the Second Circuit in *Abrams*.

Finally, the Ninth Circuit in *Price* v. *Southern Pacific Transportation Co.*, 586 F.2d 750, 753 (CA 9, 1978), made it clear that its decision to apply the three year

California statute of limitations for statutory liability to a claim for breach of the duty of fair representation "was not dictated by a desire to make the same statute applicable to the causes against both the employer and union." In language the Petitioner believes well states the reason why this Petition should be granted, the Court held, "In our view uniformity must yield to the results of proper characterization." *Price*, 586 F.2d at 753.

It is respectfully submitted that this Court should settle this issue. There is terrible confusion in the Courts below and complete diversity of opinion.

This Court in *Hoosier* refused to adopt a uniform statute of limitations in a § 301 suit. The First Circuit in *DeArroyo* is certainly correct, based on *Hoosier*, that a federal statute is needed to deal with these types of claims.

However, because of the conflict and irreconcilability of the opinions of the Courts below, it may well be appropriate for this Court to adopt a uniform statute of limitations for this type of suit. In that regard we respectfully submit this Court should absolutely reject the application of a tort statute of limitations in an employee's suit against his employer for a breach of contract. A suit under § 301, whether brought by the employer, union, or employee, must be based on contract and therefore only a contract statute of limitations can apply.

CONCLUSION

We respectfully submit that the ruling of the Sixth Circuit below is so illogical and irrational that it should not be allowed to stand. The characterization by the Sixth Circuit of plaintiff's claim against his employer for breach of contract as a tort is totally unsound. For that reason alone this Court should halt the spread of this pernicious doctrine invented by the Sixth Circuit.

However, broader issues are raised by this Petition. In *Hoosier*, this Court directed that the lower Courts need not be inventive in the area of the statute of limitations. The lower courts need only to characterize properly the claim and to look to the most applicable State statute of limitations.

However, it is now apparent that many of the Circuit Courts of Appeals have engaged in extensive judicial legislation and have adopted a uniform statute of limitations for this type of suit. A fresh review of *Hoosier* in relationship to employee § 301 suits should therefore be in order.

For the reasons stated in the Petition, a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS

(No. 77-1327 United States Court of Appeals
for the Sixth Circuit)

(Raymond R. Gallagher, Plaintiff-Appellant, v. Chrysler Corporation, Defendant-Appellee. Appeal from the United States District Court for the Eastern District of Michigan.)

(Decided and Filed January 22, 1980)

Before: Celebrezze and Keith, Circuit Judges, and Phillips, Senior Circuit Judge.

Phillips, Senior Circuit Judge.

This appeal presents the question of which Michigan statute of limitations applies to an action filed by appellant, a former employee of the Chrysler Corporation, against his employer and his Union under § 301 of the Labor Management Relations Act of 1947 [LMRA], 29 U.S.C. § 185. Appellant was discharged by Chrysler on December 6, 1971, for bringing a revolver into the Chrysler plant in violation of company rules. The Union filed a grievance, but dismissed it before reaching binding arbitration.

This suit was filed on February 13, 1976, some four years and two months after the discharge and some three years and seven months after the Union withdraw (sic) appellant's grievance at the third step in the grievance procedure prescribed in the collective bargaining agreement between Chrysler and the Union. The stated reason for the Union's action was that appellant was aware of the Chrysler rule

against bringing firearms into the plant, that Chrysler's policy was to discharge employees for violation of the rule and that the policy of the employer had been upheld by numerous arbitration decisions. The complaint charged that appellant was discharged by Chrysler without good cause and that the Union failed to represent appellant fairly, honestly and in good faith. The district court dismissed the action as barred as against both Chrysler and the Union by the three year statute of limitations.[1] The present appeal is only as to the action against Chrysler. Appellant contends that the Michigan six year statute of limitations[2] is applicable to his suit against Chrysler.

We affirm on the authority of *Vaca* v.*Sipes*, 386 U.S. 171 (1967); *Smart* v. *Ellis Trucking Co.*, 580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); and *Glowacki*

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[1] As of February 13, 1976, MCL 600.5805(7) read, in pertinent part:

> Sec. 5805. No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section. . . . .
>
> (7) The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property.

[2] MCL 600.5807(8) reads in pertinent part:

> Sec. 5807. No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section. . . .
>
> (8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

v. *Motor Wheel Corp.*, 67 Mich. App. 448, 241 N.W.2d 240 (1976).

Appellant contends that even if the action against the Union is barred by the three year statute, the six year statute applies to the suit against Chrysler, since it is based on breach of contract.

In *Vaca* v. *Sipes, supra*, the Supreme Court recognized the inherent difficulties raised by the application of multiple statutes of limitations in an action against an employer and a union under LMRA, saying:

> Assuming for the moment that Swift breached the collective bargaining agreement in discharging Owens and that the Union breached its duty in handling Owens' grievance, this case illustrates the difficulties that would result from a rule pre-empting the courts from remedying the Union's breach of duty. If Swift did not "participate" in the Union's unfair labor practice, the Board would have no jurisdiction to remedy Swift's breach of contract. Yet a court might be equally unable to give Owens full relief in a § 301 suit against Swift. Should the court award damages against Swift for Owens' full loss, even if it concludes that part of that loss was caused by the Union's breach of duty? Or should it award Owens only partial recovery hoping that the Board will make him whole? These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, *time limitations*, and remedial powers, must participate. *Id.* at 188 n. 12. (Emphasis supplied).

We hold that, in an action against an employer and a Union under LMRA, the same statute of limitations ordinarily should apply as to both defendants.[3] *See Vaca* v. *Sipes, supra; Smart* v. *Ellis Trucking Co., supra; Butler* v. *International Brotherhood of Teamsters, Local 823*, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); *Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); *Glowacki* v. *Motor Wheel Corp., supra.*

Appellant contends that his action against Chrysler is for breach of contract, to which only the six year statute of limitations applies. The action against Chrysler asserts a claim for injury to appellant's earning capacity, seeking damages in the form of lost wages and reinstatement. *See Marshall* v. *Chrysler Corp.*, 378 F. Supp. 94 (E.D. Mich. 1974); *Glowacki* v. *Motor Wheel Corp., supra; Stringer* v. *Sparrow Hosp.*, 62 Mich. App. 696, 233 N.W.2d 698 (1975).

The controlling rule was stated by the Michigan Court of Appeals in *Glowacki* v. *Motor Wheel Corp., supra:*

> In summary, we agree with plaintiff that there are two separate claims which comprise plaintiff's complaint. We further agree with plaintiff that in suits for breach of the duty of fair representation the governing period of limitations is the state statute which most directly applies (*International UJAA & AIW* v. *Hoosier Cardinal Corp.*, 383 US 696, 705; 86 S Ct 1107, 1113; 16 L Ed 2d 192 [1966]) and that the two claims are so intimately related as to require the same period of limitation to apply to both. Strong reasons of public policy exist for applying the same period of limitations to both

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[3] We decline to follow *DeArroyo* v. *Sindicato*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970), to the extent that it applied different statutes of limitations against the employer and the Union.

actions. We disagree that the applicable state statute is six years. 67 Mich. App. at 462, 241 N.W.2d at 248.

Appellant contends that his discharge was an unjust and inappropriate remedy; that he brought an unloaded pistol into the Chrysler plant after another employee, Charles E. Oxedine, had threatened his life; that Oxedine was the ring leader of a huge auto parts theft ring at the plant and later was indicted for that offense; and that appellant pointed the unloaded pistol at Oxedine in self defense at a time when Oxedine was attempting to kill him.

In view of our disposition of the statute of limitations issue, we do not reach the question of whether appellant's assertion of his use of an unloaded pistol in self defense and the other mitigating facts alleged in the complaint would have constituted a valid defense against his discharge.

The judgment of the district court is affirmed.

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 1, 1977)

(Raymond Gallagher, Plaintiff v. Chrysler Corporation, International Union, United Auto Workers (UAW) and its Local Union 372, UAW, Defendants. No. 670313)

The plaintiff in this action is seeking rehearing on the merits after this Court granted the defendants' motions for summary judgment. The record of the case and this

Court's prior Memorandum Opinion and Order will reflect that both defendants filed motions for summary judgment attaching affidavits in support of their legal positions as required under Rule 56, F.R.C.P. The plaintiff failed to respond to these motions until minutes before oral argument was to be heard when he presented a brief to this Court without benefit of any affidavits in support thereof. That non-compliance with the local rules notwithstanding, the Court considered the plaintiff's brief before determining that it should grant summary judgment in favor of the defendants. The Court's order was filed on January 25, 1977. The plaintiff filed his motion for rehearing on February 17, 1977.

This Court could, if it desired to do so, simply deny this motion on the basis of non-compliance with Local Rule IX-A governing motions for rehearing. That Rule requires such motions to be filed within 20 days after judgment is entered. This was not done in this case. Nor was a Certificate of Counsel filed as required under the Rule. Finally Rule IX-A explicitly states that generally "motions for rehearing which merely present the same issues ruled upon by the Court either expressly or by reasonable implication, will not be granted." It is clear from these pleadings that the issues raised in the motion for rehearing were addressed by both counsel.

Notwithstanding this failure to comply with the Local Rule requirements, this Court believes this matter should be disposed on the merits and is conferred the discretionary power to do so.

The plaintiff argues that the Court erred in concluding that the action against defendant Chrysler was controlled by the Michigan three year statute of limitations. While the Court's conclusion on this issue

seems to have support in the decision in *State Mutual* v. *O. & A. Corp.*, 381 Mich. 318 (1968), it should be emphasized that even if a longer statute of limitations was applicable, this claim against Chrysler is barred by the explicit language of union bargaining contract *unless* the plaintiff can demonstrate a bad faith failure of the union to redress the employee's grievance against the company. The Court has reviewed the plaintiff's untimely affidavit and still is not persuaded that the action of the union can possibly be characterized as a breach of its duty of representation.

The Court therefore affirms its decision in its Memorandum Opinion and finds the plaintiff's arguments to be without merit. His motion for rehearing is accordingly denied.

IT IS SO ORDERED.

/s/ Philip Pratt
United States District Judge

Dated: April 1, 1977
Detroit, Michigan

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed January 25, 1977)

(Raymond Gallagher, Plaintiff v. Chrysler Corporation, International Union, United Auto Workers (UAW) and its Local Union, 372 UAW, Defendants. No. 670313.)

Both defendants to this suit brought under § 301 of the Labor Management Relations Act (LMRA) have filed motions for summary judgment, contending that plaintiff is barred by the statute of limitations and that even if the matter was actionable, it must be dismissed for failure to state a cause of action for which relief may be granted. Both defendants filed affidavits supporting the latter ground with their motions and briefs. The plaintiff failed to respond to these motions until shortly before oral argument, when he submitted a brief in response. This brief lacks any affidavits and therefore the defendants' affidavits must be considered to be unrebutted and true, for purposes of the motion. Rule 56, F.R.C.P.

Defendant Chrysler Corporation argues that the action must be dismissed against it as it (1) is barred by the applicable 3-year statute of limitations, and (2) is an action in violation of the collective bargaining agreement signed by the plaintiff which provides that the union remedies be the exclusive remedies for any grievance against the company.

In *UAW* v. *Housser Cardinal Corp.*, 383 U.S. 696 (1966) the Supreme Court held that the governing statute of

limitations in § 301 actions is the most appropriate state statute, as determined by the nature of the plaintiff's action. Plaintiff's complaint invokes federal question jurisdiction pursuant to § 301 of the LMRA. While plaintiff characterizes his action as one for breach of contract, it is clear that by the very contract which he invokes, he has agreed that the union be the exclusive "arbiter" of any contractual grievances he has with the company. The law is equally clear that plaintiff's recourse to individual action against the company is conditioned on founded assertions that the union has breached its duty of fair representation, and then only if the union's conduct toward the employee is determined to be "arbitrary, discriminatory or in bad faith." *Vaca* v. *Sipes*, 386 U.S. 517 (1967). Therefore plaintiff's action can only be characterized as one based on a breach of the union's duty of fair representation. The Michigan courts have decided that such an action is subject to the state three-year statute of limitations for personal injury action. *Glowacki* v. *Motor Wheel Corp.*, 67 Mich. App. 448, 241 N.W.2d 240 (1976).

Plaintiff's action against the union is clearly barred by the state three-year statute of limitations. *W. C. Sanderson* v. *Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Smart* v. *Ellis Trucking Co.*, 409 F. Supp. 129 (E.D. Mich 1976); *Pesola* v. *Inland Tool & Mfg. Co., UAW & Its Local 155*, — F.Supp. — (E.D. Mich. 1976).

Moreover, accepting the affidavits submitted by the defendants as true (as the Court must under the circumstances) the Court concludes that the plaintiff failed to exhaust his internal union remedies which were available to him, and that as the facts are disclosed here, it is clear that defendant union did not breach its duty of representation in any fashion, much less in an arbitrary, discriminatory or bad faith manner.

For these reasons the defendants' motion for summary judgment are granted and the cause dismissed with prejudice.

IT IS SO ORDERED.

/s/ Philip Pratt
United States District Judge

Dated: January 25, 1977
Detroit, Michigan

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed January 25, 1977)

(Raymond Gallagher , Plaintiff v. Chrysler Corporation, International Union, United Auto Workers (UAW) and its Local Union, 372 UAW, Defendants. No. 670313.)

The above-entitled matter having come on before the Court upon the defendants' Motion for Summary Judgment, and the matter having been duly heard and considered and the Court having filed its written Opinion herein,

IT IS ORDERED that defendants' Motion for Summary Judgment be and it is hereby granted, and the plaintiff's complaint be and it hereby is dismissed.

/s/ Philip Pratt
United States District Judge

Dated: January 25, 1977
Detroit, Michigan